

Department of the Navy, DoD

§ 776.47

(5) Information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of materially prejudicing an impartial proceeding;

(6) The fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(7) The credibility, reputation, motives, or character of civilian or military officials of the DoD.

(c) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim, offense, or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law or regulation, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) In a criminal case, in addition to paragraphs (c)(1) through (6) of this section:

(i) The identity, duty station, occupation, and family status of the accused;

(ii) If the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) The fact, time, and place of apprehension; and

(iv) The identity of investigating and apprehending officers or agencies and the length of the investigation.

(d) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) The protection and release of information in matters pertaining to the DoN is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

(f) [Reserved]

§ 776.46 Attorney as witness.

(a) A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and quality of legal services rendered in the case; or

(3) Disqualification of the covered attorney would work substantial hardship on the client.

(b) A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by § 776.26 or § 776.28 of this part.

(c) [Reserved]

§ 776.47 Special responsibilities of a trial counsel and other government counsel.

(a) A trial counsel in a criminal case shall:

(1) Recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn;

(2) Make reasonable efforts to assure that the accused has been advised of

the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) Make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under § 776.45 of this part; and

(6) Except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

(b) Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. Such communications expressly include, but are not limited to, land-line telephone conversations, facsimile transmissions, U.S. mail, and Email. Trial counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing,

or listening to such privileged communications.

(c)(1) The trial counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), UCMJ; see also R.C.M. 103(16), 405(d)(3)(A), and 502(d)(5). Accordingly, a trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paragraph (a)(1) of this section recognizes that the trial counsel does not have all the authority vested in modern civilian prosecutors. The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities. Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See *United States v. Howe*, 37 M.J. 1062 (NMCMR 1993). Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also § 776.42(d) of this part (governing *ex parte* proceedings). Applicable law may require other measures by the trial counsel. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of § 776.69 of this part.

(2) Paragraph (a)(3) of this section does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph (a)(4) of this section recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) A trial counsel may comply with paragraph (a)(5) of this section in a

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number of ways. These include personally informing others of the trial counsel's obligations under § 776.46 of this part, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph (a)(6) of this section supplements § 776.45 of this part, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a trial counsel may make that comply with § 776.45 of this part.

(6) The "ABA Standards for Criminal Justice: The Prosecution Function," (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See *United States v. Howe*, 37 M.J. 1062 (NMCRS 1993); *United States v. Dancy*, 38 M.J. 1 (CMA 1993); *United States v. Hamilton*, 41 M.J. 22 (CMA 1994); *United States v. Meek*, 44 M.J. 1 (CMA 1996).

(d) [Reserved]

§ 776.48 Advocate in nonadjudicative proceedings.

(a) A covered attorney representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of §§ 776.42 (a) through (d), 776.43, and 776.44 of this part.

(b) [Reserved]

§ 776.49 Truthfulness in statements to others.

(a) In the course of representing a client a covered attorney shall not knowingly:

- (1) Make a false statement of material fact or law to a third person; or
- (2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or

fraudulent act by a client, unless disclosure is prohibited by § 776.25 of this part.

(b) [Reserved]

§ 776.50 Communication with person represented by counsel.

(a) In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.

(b) [Reserved]

§ 776.51 Dealing with an unrepresented person.

(a) When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney's role in the matter, the covered attorney shall make reasonable efforts to correct the misunderstanding.

(b) [Reserved]

§ 776.52 Respect for rights of third persons.

(a) In representing a client, a covered attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) [Reserved]

§ 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.

(a) The JAG and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to subpart B of this part.

(b) A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to subpart B of this part.

(c) A supervisory attorney shall be responsible for another subordinate